SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 256

Billie Sol Estes,

Petitioner,

v.

The State of Texas,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

Proceedings Relative to Petition for Rehearing by the State of Texas

BRIEF OF THE STATE BAR OF TEXAS AS AMICUS CURIAE

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TABLE OF AUTHORITIES

Cases:

	Page
Brown v. Board of Education, 347 U.S. 483 (1954)	11
Gideon v. Wainwright, 372 U.S. 335 (1963)	12
Griffin v. California, 380 U.S. — (1965)	13
Hamilton v. Alabama, 368 U.S. 52 (1961)	14
Jackson v. Denno, 378 U.S. 368 (1964)	13
Mapp v. Ohio, 367 U.S. 643 (1961)	13
In re Murchison, 349 U.S. 133 (1955)	12
Pointer v. Texas, 380 U.S. 400 (1965)	13, 15
Rideau v. Louisiana, 373 U.S. 723 (1963)	2, 9, 15
Tumey v. Ohio, 273 U.S. 510 (1927)	11
Turner v. Louisiana, 379 U.S. 466 (1965)	13
White v. Maryland, 373 U.S. 59 (1963)	14

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This *amicus curiae* brief urging Rehearing is filed pursuant to Rule 42 (4) of the Rules of the Supreme Court which dispenses with the requirement of consent by the parties to the case.

Interest of the State Bar of Texas as Amicus Curiae

The interest of the State Bar continues to be that which prompted the filing of our *amicus curiae* brief on original submission of this case. The decision of the Court is incompatible with an expressed policy of

the Judicial Section of the State Bar of Texas. Our conviction that the decision is based on considerations not properly before the Court again compels the expression of our view.

Argument

The question presented to the Court by this case in truth lies in an "unplowed field." Yet spreading salt upon the field will not stimulate the growth of information required for an intelligent appraisal of all factors bearing on the question. To speak of reassessment of the question of televised trials in the light of future refinements in the art or with respect to the impact of television on less notorious trials overlooks what is almost a certainty. That is, the Court's ruling as it now stands means that these cases will not arise, much less come before this Court. This decision is a constitutional stifling of an issue which effectively precludes further meaningful inquiry as to whether the stifling continues to be necessary or even whether it is currently necessary.

The crux of the Court's decision is its comparison of the Estes case with several others, notably *Rideau v. Louisiana*, 373 U.S. 723 (1963). It is stated in the opinion of the Court that

> "(t)he facts in this case demonstrate clearly the necessity for the application of the rule announced in *Rideau*." (Opinion, p. 17)

Analysis reveals, however, that comparisons of *Rideau* and *Estes* are inapposite, and we suggest that reexamination of the decision of the Court is in order

I.

On occasion the Court has set aside state court

convictions as violating the due process clause of the Fourteenth Amendment even absent any showing of isolatable prejudice. However, each occasion has involved the occurrence of an *event* which was presumed to be a meaningful substitute for a showing of isolatable prejudice. The *events* which will support this presumption of unfairness in the trial have been carefully circumscribed by considerations of legal history and experience. These *events*, which have been expressed as basic constitutional rights, have achieved recognition through the evolution of the Anglo-American legal system and the concurrent perception of certain well-known traits of human behavior. The long and deliberate history which has shaped these basic rights is well summarized in Part II of the concurring opinion of the Chief Justice (slip opinion, pp. 6-8). However, the mere occurrence of the *event* is not the reason for reversal. The reason is that experience shows occurrence of the *event* will probably result in an unfair trial. Thus reversal of the conviction is based on a reliably-supported presumption of unfairness.

As an example, the denial of counsel cases require no showing that the presence of counsel would have resulted in acquittal. Reversal is not ordered in these cases merely to satisfy a formalistic requirement that an accused be represented by counsel. The reason for reversal is that it is now widely recognized that the probable result of a denial of counsel is an unfair trial. Denial of counsel is the *event* which reliably supports the presumption of unfairness and the consequent reversal for denial of due process.

A similar analysis of all the situations in which convictions are set aside without requiring a showing of isolatable prejudice reveals that in each a specific *event*

has occurred. Further, the occurrence of the *event* has been found on the basis of legal and historical developments and reliable psychological considerations to carry with it the probability that unfairness will result.

II.

The Estes case differs significantly from those which the Court has reversed without requiring a showing of isolatable prejudice. In each of those cases the Court pointed to a definite *event* which offered reliable support for the presumption of unfairness. In each case the existence of this reliable support was both motivation and justification for the Court's presumption of unfairness and the consequent reversal.

In the Estes case the *event* supporting the presumption of unfairness was the presence of television cameras. We do not agree that in this case the presumption is a reliably-supported one. The view that this *event* reliably supports the presumption of unfairness in this case is itself supported by a series of presumptions rather than by the sound, rational basis which until now has been required. The factors relied upon as supporting the presumption of unfairness are in large part irrelevant to this case because they simply did not occur in this case. These factors are:

1. Witnesses will become caricatures; the testimony given and the impression made will be subtly or drastically altered.

Whatever the merits of this assumption it has little bearing on the Estes trial. There the only witnesses televised were certain representatives from the radio, press and television on the occasion of the pretrial hearing when the only matters discussed related to the televising of the trial.

The record shows that on October 2, 1963, nearly three weeks before the case was called for trial, the Court announced that no live television or sound would be permitted during the interrogation of jurors or the taking of testimony. This announcement appeared in the newspapers in Tyler (R. 9-13). It would seem that the witnesses, having a special interest in the trial, would be aware of what was common knowledge in the community. In addition there is little reason to suppose that the attorneys would not tell their witnesses whether they were to be televised. In any event petitioner neither testified nor called any witnesses. He makes no claim that the possibility of television made it difficult to obtain defense witnesses. He makes no claim that the prosecution witnesses thought they were being televised.

2. Jurors will be subject to a wide variety of pressures, fears and temptations.

This contention has little application to the plain facts of this case. Yet factors completely alien to this case are given serious, perhaps controlling, consideration. Thus it is said that other states may permit jurors to separate in televised trials even though the Estes jurors did not separate. It is said that television may divert the attention of jurors from the testimony of the witnesses even though the Estes trial was not televised during this period. It seems equally valid to speculate that in these future trials jurors will not be permitted to separate where the trial is televised or that television will not be permitted where jurors do separate. It also seems that in future trials, as in the Estes trial, invocation of the Rule against witnesses would prevent the televising or broadcasting of testimony. Ordinary restraint counsels that future cases can best be determined as they arise, and that hasty

action may settle the question before it is adequately stated.

3. Awareness of the television cameras may render counsel incapable of rendering effective service.

Reaction of counsel to conducting direct and cross-examination and devising trial strategy in a televised arena is simply a matter for another day and another trial. It has no relevance here. Although counsel for defendant stated before the testimony began that their ability would be impaired by the presence of television cameras (R. 62-66), this objection was laid to rest by the trial court ruling against live television and sound during the trial on the merits The materiality of this statement as an issue in this case is properly judged by reference to the context in which it was made and consideration of the manner in which the trial was subsequently conducted. We refer the Court to the statement of the Court of Criminal Appeals of Texas that

> "we know of no case where the accused received better or more efficient representation than did appellant in the present case." (R. 137).

4. Judges might exploit the public relations opportunities offered by televised trials.

This is merely a recognition that the incumbent has an advantage over the challenger in all phases of publicity. However, the implication is that a judge who refuses to permit television will face a torrent of criticism from the television industry. It has not happened in Texas. So far as we are aware only the Washburn trial has been televised in its entirety in Texas. (*Texas Bar Journal*, Feb. 1956; Appendix, Brief of the State Bar of Texas as Amicus Curiae on file in this case). The Estes trial was televised only to a limited extent.

We are not aware that any other criminal cases have been televised at all beyond a showing of silent film clips as background for the usual commentary on regular television news programs. Opposing the turmoil hypothecated by some and the supposed existence of relentless pressures on the judges we have the benefit of uncontroverted experience in Texas. The lesson of actual experience should weigh as heavily upon the balance as the suppositions and presumptions of those with little experience. Commercial exploitation of the judicial process simply has not occurred in Texas notwithstanding its failure to adopt Canon 35 or its equivalent. There is little rational basis for the supposition that it will suddenly do so. The Washburn trial was carried as a public service with no commercials at all. The only commercials which were shown in connection with the Estes trial were during the live telecast of the hearing on motions which occurred on September 24 and the replay of that hearing on videotape later that night. In no event was there any sale of commercial time for showing during the Estes trial. The only commercials shown were those which would have been shown regardless of the nature of the program (R. 72, 84). There are no claims of pressures actually being applied to the judges in Texas; there are only vaguely articulated fears that this could happen somewhere. If there has been any such pressure on the judges it has been demonstrably unsuccessful. It is said in the concurring opinion of the Chief Justice that

> "The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was

inconsistent with petitioner's right to a fair trial." (slip opinion, p. 16)

However persuasively this point may appeal to those who agree with it as an abstract matter, it has little relevance here. For the record clearly indicates that, notwithstanding "the power of the communications media and the criticism to which he would have been subjected," the trial judge *did* rule that live television of the trial was inconsistent with petitioner's rights. Television was restricted at the trial and as a practical matter petitioner's motion to ban live television of the trial was in large measure granted.

5. Public clamor may reach such intensity that the conduct of the trial may be affected.

Petitioner's difficulties were the subject of widespread pretrial publicity, the usual accompaniment to the fall of a prominent person. It is difficult to imagine how the television present in this case could have increased the public knowledge of the trial. In any event the trial was far removed from the place where the indictment was returned. The offense was not one which inflames the passions. There is not the slightest evidence that petitioner's trial would have been affected by mob action or swayed by undercurrents of public hostility even if completely televised. But in view of the mundane nature of the offense and the limited use of television the argument that the trial was affected by public indignation is attenuated to the point of transparency.

III.

These then are the basic arguments for the view that the presence of television in the courtroom in Tyler offers reliable support for a presumption of unfairness in the Estes trial.

It is said in the opinion of the Court that

> "(t)he State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored." (slip opinion, p. 16)

We do not say that these factors are hypothetical because they are "difficult of ascertainment." They are hypothetical because they are largely irrelevant to the case now before the Court. They did not and hardly could have occurred in the Estes trial.

The statement quoted above is followed by the statement that

> "(n)or are they 'purely hypothetical.' They are no more hypothetical than were the considerations deemed controlling in *Tumey, Murchison, Rideau* and *Turner.*" (slip opinion, p. 16)

We think the Court has fallen into serious and probably irrevocable error as a result of improper analysis of the cases cited. There is a significant difference in the considerations deemed controlling in the Estes case and those which controlled the cases cited. It will advance the understanding of our position to examine these cases as well as some others cited in support of the view that this is an appropriate case for reversal even without a showing of isolatable prejudice.

Rideau v. Louisiana, 373 U.S. 723 (1963). This trial involved a particularly brutal crime and resulted in a death sentence. The *event* supporting the presumption of unfairness was compounded of three occurrences:

1. A 20-minute film depicting the defendant while making a detailed confession was televised on three occasions in Calcasieu Parish.

2. The trial was held in Calcasieu Parish, the same Parish in which the crime was committed.

3. Three members of the jury which found Rideau guilty had seen the televised confession.

It is said that in *Rideau* the Court "constructed a rule" which required reversal of the Rideau conviction

> "even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial." (slip opinion, p. 4)

We do not dispute the existence of such a rule (even though the *Rideau* majority may have seen a nexus in the presence of three jurors who saw the televised confession). However, it has no application to the circumstances which we claim require the showing of a nexus in the Estes case. Neither *Rideau* nor any other case has established a rule permitting reliance on nonexistent factors to support a presumption of unfairness. In *Rideau* the televising of the confession *did* occur; the motion for continuance *was* denied; three members of the jury *did* see the televised confession. But in making its determination as to whether or not the presence of television in the Estes trial can rationally support the presumption of unfairness the Court has relied on considerations that *did not* occur and are therefore hypothetical. That is, the jury *did not* separate and it is wholly inappropriate to discuss what might happen when jurors do separate. The taking of testimony *was not* televised and therefore speculations about the distracting effect of television on witnesses, jurors, de-

fendants, judge and counsel are irrelevant. The Court in *Rideau* relied on certain, definite occurrences to support the presumption of unfairness. The majority in *Estes* relied to a large extent on factors that did not occur to support the presumption of unfairness. We question the logical integrity of the process by which the majority has determined that the limited presence of television in the Estes trial was such an *event* as will in turn rationally support a presumption of unfairness in the trial.

Brown v. Board of Education, 347 U.S. 483 (1954). In this case the *event* which supported the presumption of unfairness (that is, the presumption of inherent inequality in the "separate but equal" doctrine) was the existence of racial segregation in the public schools. The Court had for support nearly a century of history and such a well-developed mass of psychological data that it could say:

> "this finding is amply supported by modern (psychological) authority." 347 U.S. at 494.

In addition the series of holdings in the graduate school cases had eroded the flanks of the "separate but equal" doctrine to the extent that the decision in the *Brown* case was predictable.

Tumey v. Ohio, 273 U.S. 510 (1927). This case held that a trial in which the judge had a pecuniary interest in the outcome violated the Fourteenth Amendment. The *event* supporting the presumption of unfairness in this case was the fact that the judge, acting without a jury, received a fee only upon conviction. Manifest considerations of human nature as well as history militate against such a procedure.

The Court stated that at common law

"in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." 273 U.S. at 524.

Thus we see there existed a sound, rational and relevant basis for the decision in *Tumey*.

In re Murchison, 349 U.S. 133 (1955). The *event* supporting the presumption of unfairness in this case was that the judge who found the petitioner guilty of criminal contempt committed before a one-man grand jury was the same person who had served as the one-man grand jury and who brought the contempt charges against the petitioner. This procedure was clearly at odds with the historical separation of the function of the grand jury from that of the trial fact finder. The decision also recognized what cannot be disputed; an accuser should not judge. The opinion of the Court in the Estes case quoted the following language from *Murchison:*

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . ." (slip opinion, p. 9)

The sentence immediately following this quotation was omitted from the Estes opinion, but reveals the essence as well as the soundness of the holding in *Murchison:*

"To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." 349 U.S. at 136.

Gideon v. Wainwright, 372 U.S. 335 (1963). This case and many others dealing with various facets of the

same problem recognize that the denial of counsel reliably supports a presumption of unfairness in the trial. The *event* in these cases is the fact of denial of counsel. It is unnecessary to relate the extensive experience the Court has had in this area. The soundness of the presumption cannot be doubted.

Turner v. Louisiana, 379 U.S. 466 (1965). The *event* in this capital case which supported a presumption of unfairness was the fact that the two principal prosecution witnesses were the same deputy sheriffs who were in charge of the sequestered jury and were, therefore, continually associated in a friendly capacity with the jury during the trial. A primary objective of our system is the isolation of the jury from extraneous sources of information. Subtle argument is not required to demonstrate the clear dangers inherent in the procedures found in *Turner*. The presumption of unfairness was there based upon a factual occurrence.

There are other cases which have involved similar reasoning by the Court. Such cases as *Pointer v. Texas*, 380 U.S. 400 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Griffin v. California*, 380 U.S. — (1965); and *Jackson v. Denno*, 378 U.S. 368 (1964) have required that the Court assess the results of human behavior in varying contexts. It must be recognized, however, that these assessments have been made within a framework of values protected against federal encroachment by the Bill of Rights. The usual question in these cases has been whether rights secure against federal invasion should also be made secure against state invasion, and in *Jackson v. Denno* whether certain procedures violated a right already secure against both federal and state invasion. It is clear that the *event*

in each of those cases (i.e. *Pointer*, denial of confrontation; *Mapp*, illegal search and seizure; *Griffin*, self-incrimination; *Jackson*, coerced confession) actually occurred, and that the presumption of unfairness was founded on considerations of great substance, not the least of which was the pre-existing determination that the right should be protected against federal invasion. The *event* or right asserted by petitioner concerns a matter which has never even been before this Court. The question is not simply whether petitioner received a fair trial. That, of course, is the ultimate question. However, the absence of a showing of actual unfairness injects a new consideration into the analysis. The preliminary question which must be answered is whether the televising of Estes' trial can reasonably support a presumption of unfairness. The answer to this question requires attention to the actual manner in which the trial was conducted and the actual extent to which the trial was televised.

IV.

We recognize that due process must be observed during the pretrial stages. In *Hamilton v. Alabama*, 368 U.S. 52 (1961), the defendant was not represented by counsel at his arraignment. The Court took cognizance of the fact that under Alabama law certain substantial matters were required to be presented at arraignment. Since the defendant was not represented by counsel during this critical period when substantial advantages could have been waived through ignorance, the conviction was set aside. In *White v. Maryland*, 373 U.S. 59 (1963), the defendant pleaded guilty in a preliminary hearing at a time when he was not represented by counsel. This guilty plea was later introduced in evidence at the trial. The conviction was reversed by

this Court. In *Pointer v. Texas* 380 U.S. 400, *supra*, the testimony of the chief prosecution witness was taken at an examining trial. The defendant who was not then represented by counsel did not cross-examine. At the later trial the witness was not available and the transcript of his testimony at the examining trial was introduced in evidence over his objection. The conviction was reversed by this Court. These cases have been reversed because of the substantial relation between the pretrial occurrence and the merits of the issue decided at the trial.

There is a superficial resemblance between *Rideau*, 373 U.S. 723, *supra*, and *Estes*. In each a proceeding was televised in advance of the actual trial. But there the resemblance ends. In *Rideau* the defendant's detailed confession to a brutal crime was televised on three occasions in the Parish in which the crime was committed. The trial was held two months later in the same Parish before a jury which included three people who had seen the televised confession. It is difficult to imagine a more substantial relation between a pretrial event and the merits of the trial itself. In *Rideau* the subject matter of the pretrial telecast was in every respect identical to the subject matter of the trial on the merits. The subject matter on each occasion was Rideau's guilt or innocence of a certain crime.

In *Estes* the September hearing was concerned with petitioner's objection to televising the trial. It is said that since this hearing was itself televised

> "(p)etitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom." (Concurring opinion of the Chief Justice, slip opinion, p. 16)

We disagree. We suggest, however, that it is beside

the point since the motion was in effect granted insofar as it related to live television coverage of the trial. The September hearing did not discuss the merits of the case. The subject matter of that hearing and the trial were not the same. The live television coverage of the trial was extremely limited.

V.

Coupled with the Court's analysis, perhaps the cause of it, is the deeply-felt concern with which the Court views any discussion of television in the courtroom. But this concern, commendable for its devotion to fairness, must not be translated into an excessive fearfulness which obscures the issues. However, such fears are indicated by certain language in the opinions. References are made to the trial as a "show" or "theater," to the television camera lens as "snouts" and to trial judges and the television industry as "partners." The Estes trial is somehow compared with trials in Moscow and Havana. A New York Times article in classic journalese is cited as a supplement to the record in the case. There is a phantasmagorial recollection of the television quiz show scandals. These remarks do not contribute to a rational consideration of the factors relevant to this case. More importantly they import a zeal which has lost sight of the objective—an apprehension of the possible which has veiled the actual. We do not come to praise the televised trial, neither do we wish to see it buried in constitutional cerements. The objective is neither to praise nor bury. It is to determine whether actual unfairness tainted the Estes conviction, or whether unfairness can be presumed from the actual manner in which the trial was conducted. It was stated in the opinion of the Court that

> "(o)ur judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today." (slip opinion, p. 18)

The "facts as they are presented" by the record in this case will not support a presumption of unfairness in the trial.

Sustaining this conviction will not affect the validity of Canon 35 in jurisdictions where it or similar language is enforced. It will not change the notions of lawyers and judges as to proper courtroom decorum. It will not give the television industry carte blanche to the courtroom. It will not mean that televised trials are desirable. It will only mean that the limited presence of television in petitioner's trial was not a violation of the Fourteenth Amendment.

CONCLUSION

For the reasons stated the Petition for Rehearing should be granted.

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